No. 11510.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JAY H. MONTGOMERY and VICTOR KREMER,

Appellants.

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

CASES. PAGE

Jurisdiction 1

Statement of the facts 2

Argument 3

Point I 3

Point II 4

Point III 5

Conclusion 6

TABLE OF AUTHORITIES CITED

Cases.

	PAGE
Forthoffer v. Swope, 103 F. (2d) 707	5
Lindsay v. United States, 134 F. (2d) 960; cert. den. 319 U. S. 763	5
Roberto v. United States, 60 F. (2d) 774	5
Ruggiero et al. v. United States, 156 F. (2d) 976	5
Schultz v. United States, 155 F. (2d) 721	3
Steffler v. United States, 143 F. (2d) 772; cert. den. 323 U. S. 746	5
United States v. Norris, 281 U. S. 619	5
Weir v. United States, 92 F. (2d) 634; cert. den. 302 U. S. 761	5

Statutes

Judicial Code, Sec. 24 (28 U. S. C. 41(2))	1
Judicial Code, Sec. 128 (28 U. S. C. 225)	1
Second War Powers Act of March 27, 1942, Title III, Sec. 2(a) (50 U. S. C. App. 633)	1
United States Code, Title 18, Sec. 88	2, 4
United States Code, Annotated, Title 50, Sec. 633(5)	3

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APPELLEE'S BRIEF.

Jurisdiction.

The United States District Court for the Southern District of California had jurisdiction of the cause under Section 2(a), Title III, of the Second War Powers Act of March 27, 1942, as amended (50 U. S. C. App. 633), and under Section 24 of the Judicial Code (28 U. S. C. 41(2)). Judgment against each of the appellants was entered on December 16, 1946 [R. 14, 15].[1] Notices of appeal were filed on December 23 and 24, 1946 [R. 17-18]. This Court has jurisdiction under Section 128 of the Judicial Code (28 U. S. C. 225).

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[1]References preceded by the letter "R" are to the printed record on appeal

Statement of the Facts.

On July 17, 1946, the Grand Jury in and for the Southern District of California, Central Division, returned an Indictment in six counts against the two appellants, and others, charging in Count One a conspiracy in violation of 18 U. S. C. §88, and in Counts 2 to 6, inclusive, substantive violations of the Second War Powers Act and ration orders issued pursuant to it [R. 2-9]. On October 29, 1946, appellants Montgomery and Kremer each withdrew their prior pleas of not guilty [R. 10] to Counts 2, 5, and 6 of the Indictment, and entered to each of those counts a plea of *nolo contendere* [R. 11]. On December 16, 1946, appellant Kremer was sentenced to imprisonment for a period of three months on each of Counts 2, 5 and 6, the sentences to run concurrently [R. 14], and appellant Montgomery was sentenced to imprisonment for a period of one year on each of Counts 2, 5 and 6, the sentences to run concurrently [R. 16]. Following sentence of the appellants upon those counts, Counts 1, 3 and 4 were dismissed as to each of the two appellants upon motion of the United States Attorney [R. 13, 14, 16].

ARGUMENT.

Point I.

Appellants assert (A.B. 3)[2] that the Indictment fails to state an offense for the reason that it does not say that the defendants "unlawfully" acquired and possessed the commodity which they are charged with having had in violation of the law.

Manifestly, the inclusion of the word "unlawfully" in an indictment is not a *sine qua non* to its sufficiency. See, e. g., *Schultz v. U. S.*, 155 F. (2d) 721 (C. C. A. 9). An indictment is sufficient if it charges the offense in the language of the statute. Here the statute makes it illegal for any person to act "wilfully" in the ways proscribed.[3] And the indictment here so charges.

An examination of the forms of indictments which the Supreme Court of the United States has appended to the "New Rules of Criminal Procedure for the District Courts of the United States," discloses that in no instance is the word "unlawfully" included in any indictment. (See Appendix of Forms, Forms 1-10, inclusive.)

We fail to see any possible relevancy to this case (A.B. 3) of appellants' statement that "Merely setting up facts which may constitute a violation of law does not over-

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[2]References preceded by "A.B." are to appellants' opening brief.

[3]50 U. S. C. A. §633(5) provides:

> "Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provisions of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both."

come the presumption of innocence which surrounds an accused." And the *Schmitz* and *Cruickshank* cases cited by appellants (A.B. 3) likewise appear to have nothing to do with this case.

The indictment here was plainly sufficient.

Point II.

Appellants assert (A.B. 4) that the Indictment charges multiple conspiracies in that it charges the conspiracy in Count One and then charges separate conspiracies in other counts. This contention is frivolous.

Count One charges a conspiracy in violation of 18 U. S. C. §88. Counts 2 to 6, inclusive, charge substantive violations of the Second War Powers Act, not conspiracies.

It is difficult to see how the appellants can in good faith make the assertions which they do as to the multiple conspiracies. Plainly, this Court should not be called upon to spend its time adjudicating non-existent controversies predicated upon utterly baseless contentions.

Nothing in the Indictment here violates any principle contained in the *Kottcakos* case, as asserted by appellants in their brief without further discussion or explanation (A.B. 4).

Moreover, appellants' pleas of *nolo contendere* were to Counts 2, 5 and 6, the misdemeanor counts charging substantive violations of the Second War Powers Act, not to the conspiracy count, count 1. Since the balance of the Indictment was dismissed as to these appellants, they plainly have no standing to complain as to any of the counts upon which they were not sentenced and which are, therefore, not before this Court.

Point III.

Likewise, without merit is appellants' asesrtion (A.B. 4) that the Indictment attempts to create an offense not by reason of any statute, but by reason of an administrative order.

This contention has been decided adversely to appellants by this Court in *Ruggiero et al. v. United States,* 156 F. (2d) 976 (C. C. A. 9, 1946), where it is stated at page 977:

> "The statute itself makes a crime of the violation of regulations or orders made pursuant to the statute, and provides the penalties to be imposed. 50 U. S. C. A. Appendix, §633(5).
>
> "It is clearly within the constitutional power of Congress to so impose criminal liability for the violation of an order or regulation promulgated by an administrative body."

Moreover, it is established that a plea of guilty constitutes a waiver by the defendant of all defects and objections pertaining to the form of the indictment or information. *Forthoffer v. Swope,* 103 F. (2d) 707, 708 (C. C. A. 9, 1939); *Roberto v. United States,* 60 F. (2d) 774, 776 (C. C. A. 7, 1932); *Weir v. United States,* 92 F. (2d) 634, 635 (C. C. A. 7, 1937), cert. den. 302 U. S. 761; *Lindsay v. United States,* 134 F. (2d) 960, 962 (C. C. A. 10, 1943), cert. den. 319 U. S. 763; *Steffler v. United States,* 143 F. (2d) 772, 774 (C. C. A. 7, 1944), cert. den. 323 U. S. 746. And a plea of *nolo contendere* is equivalent to a plea of guilty for such purposes in the particular case in which it is entered. See, e. g., *United States v. Norris,* 281 U. S. 619, 1930.

Conclusion.

Counts 2, 5 and 6 of the Indictment clearly state an offense against the laws of the United States. Upon appellants' pleas of *nolo contendere* to each of those counts, the judgments entered were within the discretion of the trial court, and should be sustained.

Respectfully submitted,

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